United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

76-4054

BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 76-4054

RCA GLOBAL COMMUNICATIONS, INC.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and
UNITED STATES OF AMERICA,
Respondents,

ITT WORLD COMMUNICATIONS INC., et al.,
Intervenors.

ON REVIEW FROM THE
FEDERAL COMMUNICATIONS COMMISSION

B
pls

DONALD I. BAKER,
Assistant Attorney General,

CARL D. LAWSON,
Attorney,

JAMES F. PONSOLDT,
Attorney,

Department of Justice
Washington, D.C. 20530

WERNER K. HARTENBERGER,
General Counsel,

DANIEL M. ARMSTRONG,
Associate General Counsel,

JACK D. SMITH,
Counsel,

Federal Communications Commission
Washington, D.C. 20554

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 76-4054

RCA GLOBAL COMMUNICATIONS, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and
UNITED STATES OF AMERICA,
Respondents,

ITT WORLD COMMUNICATIONS INC., et al.,
Intervenors.

ON REVIEW FROM THE
FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR RESPONDENTS

STATEMENT OF THE ISSUES

1. Whether it was proper for the Commission to determine that the facts needed to prescribe a new rule to govern the distribution to international record carriers of unrouted international telegrams could lawfully and appropriately be assembled and analyzed under the traditional informal rulemaking procedures without the necessity for a trial-type proceeding.

2. Whether the Commission acted arbitrarily or capriciously when it concluded that the new formula herein adopted for the distribution to international record carriers of unrouted international telegrams would better serve the public interest and be more equitable than the formula it was replacing which had been adopted 33 years ago under very different circumstances.

COUNTERSTATEMENT

Petitioner RCA Global Communications, Inc. seeks review of a Federal Communications Commission order which repealed the formula that for the past 33 years had governed the distribution to international record carriers (IRCs) of unrouted message telegraph traffic bound for international points.[1/] The Commission found the old formula to be unjust, unreasonable, inequitable and not in the public interest, and therefore as required by Section 222(e)(3) of the Communications Act, replaced it with a formula which is just, reasonable, equitable, and in the public interest.

1. Background:

A. The Industry.

In order to avoid unnecessary redundancy, respondents adopt the background discussion concerning the industry and the services affected by the Commission's order set forth in petitioner's brief at pp. 5-9.

B. The 1943 Formula.

Prior to World War II, there were two carriers providing domestic pickup and delivery of public message

---

1/ The citation for the order under review is International Record Carriers' Scope of Operations in the Continental United States, Including Possible Revisions to the Formula Prescribed Under Section 222 of the Communications Act, 57 FCC 2d 190 (1976) (J.A. 1); reconsideration denied, FCC 76-882 (September 27, 1976) (J.A. 70).

telegraph service, the Western Union Telegraph Co. (WU), and the Postal Telegraph Cable Company (Postal). For many years Postal had been experiencing a steady decline in revenues, and by 1943 it appeared to be in danger of imminent financial collapse. WU was also experiencing economic difficulties.

In order to strengthen the telegraph industry, Congress initiated an extensive review looking toward the enactment of remedial legislation. S. Res. 95, 76th Cong., 1st Sess. (1939). This resulted in 1943 in the addition to the Communications Act of Section 222, 47 U.S.C. 222, designed to permit WU and Postal to merge and thus avoid the prospect of cutbacks in service engendered by the demise of Postal.

Of course, since WU would emerge from such a consolidation with a virtual monopoly of the domestic message telegraph industry,[2/] and since the international record carriers (IRCs) were dependent upon the domestic carriers to pick up and forward to them the international message, Congress took steps to insure that WU would not be in a position to favor its own international division (WU Cables) over the independent IRCs. Thus, the new legislation included a provision

2/ There was a limited IRC domestic message service prior to World War II. However, during the war, the War Communications Board ordered those operations terminated for reasons of national security, and they were never resumed.

requiring WU to divest itself of its cable division, 47 U.S.C. 222(c)(2).[3/]

Since divestment was not made a pre-condition of the merger, WU would continue its international operations until such time as a purchaser for them was found. Section 222(e)[4/] was included to provide a method for insuring equitable distribution among the IRC's of outbound international telegrams by WU which would avoid favoritism to WU's own cable division pending divestment or any other IRC.

In 1943, the Commission approved an application for merger of WU and Postal, and at the same time adopted a method of distribution for outbound international telegrams. Application for Merger of Western Union and Postal Telegraph, 10 FCC 148 (1943), and 10 FCC 184 (1943). That formula, with some modifications, remained in effect until the Commission revised it in 1976 in the order here under review.

The 1943 formula distributed the traffic under a plan which divided the world into three areas: (1) Area "A" (Atlantic), (2) Area "B" (Latin America), and (3) Area "C" (Pacific). Each area was subdivided into "Subareas" to cover

3/ Addendum A-1.

4/ Addendum A-2.

specific countries and territories. Since the central concern was that WU not favor any one IRC over its competitors, the formula was designed to insure that each IRC would have as much traffic as it did prior to the merger. Thus, it provided that each IRC would receive enough unrouted messages so that its share of the total telegram revenues for traffic to each subarea would be the same as it had been in the year 1942 (the last full year prior to the merger).[5/] The 1943 formula operated to provide each carrier a quota of messages in each subarea it serves. If the number of messages turned over in any month either exceeded or did not fulfill a carrier's quota, the formula adjusted the number of unrouted messages it would receive to assure that its quota was met thereafter.[6/]

5/ Where service to a subarea of Areas A or C had been interrupted by the War, instead of year 1942, the base period for determination of quotas would be the last twelve month period prior to the interruption in which all interested IRC's were normally handling traffic to that country.

6/ Actually, there were two separate formulas provided for -- one for gateway-originated traffic and one for hinterland-originated traffic. The formula provides to named IRC's a quota for each category of traffic, for each subarea of destination, and for each recognized origin point.

The Commission retained the responsibility to oversee the operation of the formula as a whole and to assure that it continued to serve the public interest. 7/ It emphasized that the formula it was then accepting was an interim document which would probably require major revisions after the end of World War II:

> Only continued experience under the formulas which we are now approving or prescribing can indicate to what extent future modifications may be required by equity and the public interest. 8/

Recognizing that the provisions for fixed quotas limited competition between the IRCs, the Commission nonetheless found that the formula was acceptable because in other respects it "continue[d] and even promote[d] reasonable competition." 10 FCC at 195. Although it was willing to accept some lessening in competition, it stated:

> We intend to maintain careful surveillance over the operations of the international telegraph carriers to assure that progress in providing efficient and economical service in this field will continue.

Ibid. (emphasis added).

7/ Although the formula has been somewhat modified over the years, as in 1961 when WU sold its international operations and Western Union International came into existence, there have been no thoroughgoing review or structural revisions of the formula until the order here under review. Day-to-day administration of the formula is conducted by the International Formula Committee, made up of representatives of the interested IRC's, which issues, through its staff - the International Quota Bureau (IQB) - instructions to WU directing it to distribute unrouted messages.

8/ 10 FCC at 197. See also the Commission's characterization of the formula as an "interim document" at the time it approved the divestment of WU's international operations in 1961. Western Union Divestment, 30 FCC 323, 373-374 (1961).

2. The Proceedings Before the Commission.

In response to various petitions and requests regarding the domestic handling of international record traffic, the Commission in 1972 initiated a general inquiry into the relationship between WU and the IRC's. Notice of Inquiry and Proposed Rulemaking, Docket No. 19660, 38 FCC 2d 543 (1972) (J.A. 85). Among the matters included in that inquiry was a petition by ITT requesting the Commission to revise the 1943 formula, charging that the technical, operational, and corporate changes which had occurred in the international message industry since 1943 had made it anachronistic and inequitable. In 1973 the Commission decided to separate the various issues in Docket 19660, and consider the ones raised by ITT first. International Record Carriers' Scope of Operations, 43 FCC 2d 1174 (1973) (J.A. 70).

The proceedings before the Commission were quite extensive covering over two years. During this time the Commission received extensive pleadings filed by numerous parties, including five rounds of comments filed by the IRCs, a Western Union study of outbound message traffic and other statistical data submitted by the International Quota Bureau. After analyzing the volumes of material before it, the Commission found that the 1943 formula was unjust, unreasonable, inequitable and not in the public interest.

The Western Union study was authorized after a series of meetings between the IRC's, WU and the Commission staff.

The parties agreed upon a plan whereby WU would collect certain statistical data in order to analyze the manner in which international message traffic was then being distributed under the 1943 formula. Memorandum Opinion and Order, Docket 19660, 47 FCC 2d 225 (1974) (J.A. 102). The study, covering a 13 week period and supplemented by other data, revealed that there was no logical relationship between a given carrier's handling of routed traffic and its handling of unrouted traffic. 57 FCC 2d at 199 (J.A. 13). For example, RCA, the largest carrier, obtained 38.4% of all the traffic. Although it received fewer routed WU transfers than either ITT or WUI, RCA received under the formula almost half of all the unrouted traffic (48.2%). ITT which handled slightly more routed WU transfers (32.9%), received only 11.4% of the unrouted transfers.

At its inception, the 1943 formula was designed to preserve proportionate distribution to most, if not all destinations. However, the Commission discovered that the formula had created a situation where 85% of the total traffic was not distributed proportionately. 57 FCC 2d at 200 (J.A. 14). The whole situation had become so distorted that for many destinations one or another carrier received all the unrouted traffic (referred to as an exclusive point).

The Commission found that these serious distortions in distribution patterns resulted from a structural weakness

in the 1943 formula itself. The old formula had two provisions, which, although considered complementary in 1943, had proven over the years, to be an unworkable combination: (1) in order to assure that the sender's choice of a particular IRC would be honored, each carrier was to receive all traffic specifically routed via it; and (2) since the formula sought to keep market shares static, any carrier which increased its proportionate share through routed traffic had to give up an equivalent amount of unrouted traffic so as to restore overall balance, and conversely the carrier whose share had declined would receive additional unrouted traffic. 57 FCC 2d at 200 (J.A. 15).

The Commission recognized that the 1943 formula would have worked fine as long as conditions in the industry did not deviate significantly from those in the base year. However, the situation did not stay the same as it was in 1942:

> The IRCs expanded their gateway operations, and self-generated traffic (by definition specifically routed) became a more important part of total traffic than it was during the base year. The rapid increase in gateway-originated traffic upset the delicate balance needed for the formula operation and caused a proportionate decline in the relative amount of unrouted traffic available to redress imbalances. This led to the emergence of the "overages" and "deficiencies" which have plagued formula administration since its inception and led to the effective demise of the proportionate distribution system. 9/

9/ 57 FCC 2d at 200. (J.A.- 15).

A carrier which obtains so much routed traffic that it exceeds its quota obtains an "overage". Conversely, a deficiency occurs when a carrier receives insufficient routed traffic to satisfy its quota. Over the years the pool of unrouted messages to many subareas became so small that deficiencies could not be made up. Thus, the carriers began to accumulate overages and deficiencies. By 1976, the accumulations were so high that they could probably never be corrected. RCA had accumulated deficiencies of $49.8 million, while ITT had accumulated overages of $24.6 million and WUI overages of $24.8 million. 57 FCC 2d at 201 (J.A. 15-16).

The practical result of all this was that the unrouted traffic all began to go, not to the carriers who were most successful in attracting traffic, but to those who were the least successful. For example, the Commission found that RCA has been relatively unsuccessful in attracting traffic on its own, but astoundingly enough, its market share has not declined as a result; instead it has increased due to the formula turning over to it more and more unrouted traffic. 57 FCC 2d at 201 (J.A. 16).

As this continued, the ultimate effect has been that the carrier with the largest deficiency has come to receive all unrouted traffic to a given destination. The situation has deteriorated to the point that to most destinations all the unrouted messages are given to a single carrier. 57 FCC 2d at 200, 202 (J.A. 14, 17).

The Commission found that the market sharing features of the 1943 formula were "ill-designed" to advance the Commission's goal of providing the residents of the United States "a rapid, efficient communications service with adequate facilities and reasonable charges. 47 U.S.C. §151." 57 FCC 2d at 208 (J.A. 25-26). The 1943 formula had created a situation where there was no stimulus to improve service or increase efficiency. The Commission said it could not ignore the possibility that quality of service could have been improved absent the inequities of the formula. Thus, it concluded that the 1943 formula had created a situation so "injurious to the public interest" that it had to be eliminated. 57 FCC 2d at 202. (J.A. 17).

The Commission decided that the public interest would best be served by a system which distributed all the international message traffic on the basis of customer choice. However, it did not have enough information before it to properly determine how best to proceed to implement such a plan, or how much of an economic burden would be involved. Accordingly, it directed the interested parties to submit comments addressing pertinent matters "concerning the implications of the all-routed approach and the means to implement it in an expeditious and orderly fashion." 57 FCC 2d at 210. (J.A. 28).

To cover the intervening time until further action is taken on the all-routed proposal, the Commission prescribed an interim formula designed to "provide an equitable means of

distribution which will focus on customer selection and give the IRCs a chance to solicit routings." Ibid. The interim formula requires the International Quota Bureau to distribute unrouted messages to international destinations in the same proportion as the carrier has routed messages to that destination, and thus establishes a stimulus for the IRCs to improve service and efficiency for the benefit of the public.

RCA filed with the Commission a petition for stay of the Commission's order, and WUI filed a petition for reconsideration. In order to give itself time to adequately address these pleadings, the Commission stayed the effective date of the interim formula. International Record Carriers, 58 FCC 2d 266 (1976). On September 27, 1976, the Commission denied the RCA and Western Union petitions, finding that the public would benefit from the implementation of the interim formula and that no adequate reason had been presented which would require the Commission to deny the other carriers the equitable distribution embodied in the interim formula. Reconsideration Order, FCC 76-882, at p. 10 (J.A. 79). The Commission continued the stay of the effective date to enable RCA to obtain a ruling on the stay it had filed with this Court. Id., at 15 (J.A. 84).

RCA's motion for stay was denied by order of this Court dated October 19, 1976. Subsequently, the Commission adopted an order vacating the agency stay, effective

November 13, 1976 (the date which Western Union had indicated it could begin to implement the new formula under automated procedures). International Record Carriers' Scope of Operations, FCC 76-1035, November 18, 1976. (A copy is attached hereto as Addendum A-6).

ARGUMENT

I. THE HEARING PROCEDURE FOLLOWED BY THE COMMISSION WAS LAWFUL AND APPROPRIATE.

Petitioner argues that Section 222(e) of the Communications Act, 47 U.S.C. 222(e), requires the Commission to conduct a trial-type hearing before revising the 1943 formula, and that since it did not, the Commission's order must be remanded. Petitioner does not claim that it was denied a hearing. Rather, it seeks a "trial-type" hearing of the kind specified in §309(e) of the Communications Act, 47 U.S.C. 309(e). The hearing required under Section 309 is one where "every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts." United States v. Storer Broadcasting Co., 351 U.S. 192, 202 (1956).

Our argument below relies primarily on the principles laid down by the Supreme Court almost four years ago in United States v. Florida East Coast Railway Co., 410 U.S. 224 (1973). There the Court addressed the question of whether a provision in the Interstate Commerce Act which permitted the ICC "after hearing" to establish reasonable "rules, regulations and practices" with respect to freight car service, including the compensation to be paid by one railroad for using the cars of another, required the ICC to afford

interested parties a "trial-type" hearing. The legislative history indicated congressional belief that "full hearings" would be accorded in the case of the particular agency action there in issue and the ICC itself appeared at one point to have believed that "trial-type" hearings were required.[10/] In the case before the Court, however, the ICC had denied the parties a trial-type hearing in the absence of a request showing "with specificity the need therefor and the evidence to be adduced," and proceeded to establish industry-wide incentive per diem rates for freight car use on the basis of written statements of fact and position. 410 U.S. at 234. The Supreme Court upheld the ICC's action, ruling that it was engaged in a rulemaking proceeding, involving a "basically legislative-type judgment," 410 U.S. at 246, and that, therefore, the procedures followed satisfied both the requirements of the Interstate Commerce Act and the Administrative Procedure Act. We maintain that these principles are controlling in the case here under review, and that the same result must follow.[11/]

That the formula for routing outbound international message traffic is a rule is not controverted. It meets every requirement laid down in the definitions section of the Administrative Procedure Act, 5 U.S.C.551 (APA) which defines a rule as:

10/ Florida East Coast Railway, supra at 254-55 (Douglas, J., dissenting.)

11/ For an in depth treatmentof the Florida East Coast Railway decision and discussion of the state of the law since that case, see Friendly, Some Kind of Hearing, 123 University of Pennsylvania Law Review 1267 (1975).

> an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy 12/

Accordingly, a revision of the international formula is a "rulemaking":

> "rulemaking" means agency process for formulating, amending, or repealing a rule; 13/

Section 553, of the Administrative Procedure Act, 5 U.S.C. 553, 14/ sets forth the requirements federal agencies must follow in rulemaking proceedings. A notice of proposed rulemaking must be published in the Federal Register; 15/ after notice the agency must give interested persons an opportunity to participate in the rulemaking through appropriate submissions "with or without opportunity for oral presentation;" 16/ and after consideration of the relevant matter presented the agency shall incorporate in the rules adopted a concise general

---

12/ 5 U.S.C. 551(4).

13/ 5 U.S.C. 551(5). The fact that the International Formula prescribes for a small, and readily identifiable group of companies does not change the character of the proceedings from rulemaking to an adjudication. See American Airlines, Inc. v. CAB, 359 F.2d 624, 630, n.17 (D.C. Cir.) cert. denied, 385 U.S. 843 (1966), where the court upheld a CAB rulemaking which prescribed for only two carriers; Bell Telephone Company of Pennsylvania v. FCC, 503 F.2d 1250 (3rd Cir.), cert. denied, 422 U.S. 1026 (1975) where the court rejected arguments by AT&T that FCC's focus in a rulemaking proceeding upon an individual carrier required an evidentiary hearing; and 1 Davis, Administrative Law §502 (1958).

14/ Addendum A-3.

15/ 5 U.S.C. 553(b).

16/ 5 U.S.C. 553(c).

statement of their basis and purpose.[17] It is only when rules are required by statute "to be made on the record after opportunity for an agency hearing" that the agency must provide the "trial-type" proceeding sought by RCA under the provisions of 5 U.S.C. §§556, 557.[18] United States v. Alleghency-Ludlum Steel Corp., 406 U.S. 742, 757 (1972).

Petitioner does not dispute that the Commission's order meets the procedural requirements for a rulemaking not required to be made "on the record after opportunity for an agency hearing." Instead, it presents three alternative arguments, each designed to show that the Commission acted unlawfully by utilizing the rulemaking procedures set forth in section 553 of the APA instead of the trial-hearing procedures set forth in sections 556 and 557 of the APA: (A) that the "full hearing" requirement of Section 222(e)(3) entitles RCA to a trial-type hearing independent of its rights under the APA; (B) that the language in Section 222 (e)(3) is equivalent to a requirement that the rule be made "on the record after opportunity for an agency hearing;" and (C) that even if the Commission did have discretion to choose between types of procedure, the kinds of issues involved required it to select a trial-type inquiry. We will address each of these contentions in order.

17/ Ibid.

18/ Ibid. 5 U.S.C. §§556 and 557 are reproduced infra at Addendum A-4, A-5.

A. As to petitioner's first argument, there is no evidence either in the statute itself or the legislative history to support the contention that Congress intended proceedings under Section 222(e)(3) to require more than the traditional rulemaking procedures.[19] Nor can the fact that the agency regarded trial-type proceedings as appropriate in order to establish the 1943 formula be construed as a determination that such proceedings were required,[20] or that the agency is prohibited from adopting a different approach in the light of changing or new circumstances.[21]

It must be remembered that Congress required the Commission to prescribe the original formula "in its order approving and authorizing the proposed consolidation or merger." 47 U.S.C. 222(e)(1). Thus, the agency

19/ The APA provides that none of its provisions "limit or repeal additional requirements imposed by statute or otherwise recognized by Law." 5 U.S.C. 559. Intervenor WUI concedes that "a trial type hearing might not necessarily be appropriate as a prerequisite for promulgation of a new formula" (WUI Br., at p. 6), but argues that trial-type proceedings were necessary before the Commission could invalidate that 1943 formula. We find no suggestion in the statute that two hearings are required, one to determine the effectiveness of the old formula and one to determine appropriate features of its replacement. Moreover absent compelling reasons for holding two proceedings, such a division would appear to be a redundant, wasteful expenditure of Commission resources and energy as well as that of the parties concerned.

20/ Moreover, "since any agency is free under the [APA] to accord litigants appearing before it more procedural rights than the Act requires, the fact that an agency may choose to proceed under §§556 and 557 does not carry the necessary implication that the agency felt it was required to do so." 410 U.S. at 236, n. 6.

21/ Bell Telephone Company of Pennsylvania, supra at 1265.

was compelled to consider the question of a proper formula at the same time it was considering the broad questions posed by the WU-Postal merger application, and it quite properly regarded the formula problem as part and parcel of the overall determination. Clearly, to have designated a separate proceeding for the formula question would have been an absurd and unnecessary waste of resources.[22/] Even petitioner concedes that the 1943 formula was "largely the product of inter-carrier negotiation and agreement," (Br. at p. 43), and it is evident that the hearings were directed primarily toward the propriety of the merger and only tangentially into the appropriate structure for the international formula. Under such circumstances the fact that the Commission inserted the formula question into the broader merger proceedings cannot be construed as an indication that the Commission felt that a trial-type hearing was required in order to prescribe the 1943 formula.

Similarly, the fact that the Commission has employed trial-type procedures to adjudicate complaints from Western Union regarding the lawfulness of its toll

22/ Section 222(c)(1) required the Commission to hold "public hearings" with respect to the merger application. At least two recent decisions have held that the term "public hearing" does not require trial-type proceedings. Anaconda Co. v. Ruckelshaus, 482 F.2d 1301, 1306 (10th Cir. 1973); South Terminal Corp. v. EPA, 504 F.2d 646, 660 (1st Cir. 1974).

divisions with the IRCs does little to strengthen petitioner's argument. When such complaints are filed the Commission is obligated to insure that the divisions are "just and reasonable," i.e., that the carrier is receiving enough money to enable it "to operate successfully, to maintain financial integrity, to attract capital, and to compensate its investors for the risks assumed . . . ." Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591, 605 (1944). Generally, the most practical method to acquire the necessary facts to make such determinations has been a trial-type proceeding.[23/] As stated by this Court in WBEN, Inc. v. U.S., 396 F.2d 601, 618 (2nd Cir. 1968):

> Adjudicatory hearings serve an important function when the agency bases its decision on the peculiar situation of individual parties who know more about this than anyone else. But when, as here, a new policy is based upon the general characteristics of an industry, rational decision is not furthered by requiring the agency to lose itself in an excursion into detail that too often obscures fundamental issues rather than clarifies them.

23/ The 1974 Opinion of the Commission's Review Board stating its belief that Section 222(e)(3) contemplates an adjudicatory proceeding, International Record Carriers Scope of Operations, 44 FCC 2d 1069 (1974), was issued within the context of a toll division proceeding where the Commission had very clearly designated adjudicatory issues for hearing. 44 FCC 2d at 1069 n.1. Moreover its determination relied upon an erroneous interpretation of the APA which had been incorporated into Section 1.1207 of the Commission's rules, 47 C.F.R. 1.1207, and which was subsequently corrected by the Commission
(footnote continued on next page)

In contrast to the toll division cases, the Commission here was involved with broad policy issues where the determinative facts were not obscure or disputed. RCA's insistence upon a trial-type hearing was originally based on the belief that there was not enough data upon which the Commission could base a decision. However, it urged that the completion of the Western Union statistical study coupled with the opportunity to file comments thereon would put the Commission in a position to make a decision in this proceeding

> This problem concerning the lack of data was also the major factor why RCA Globcom is still insisting on an oral, evidentiary hearing, as is required by Section 222(e)(3) of the Communications Act, rather than a paper rulemaking one. While we have no doubt that an oral, evidentiary hearing could be insisted upon as a matter of right, especially in light of the Commission's statement concerning the absence of facts in this proceeding, the completion of the Western Union statistical study with the opportunity to file further comments after evaluating the study results, and before the Commission issues its decision, would almost, if not entirely, eliminate our concerns in this respect.

Reply Comments of RCA Global Communications, Inc., August 16, 1974, p. 13 (J.A. 336). The Commission did delay the proceedings to receive the results of the Western Union study, and RCA and the other IRCs submitted two rounds of comprehensive comments thereon. Having persuaded the Commission to follow the procedures it suggested, RCA should not now be heard to claim that the only way the Commission could make a decision in this docket was to have a trial-type hearing.

23/ (footnote continued from previous page)
(Restricted Rulemaking Proceedings, 39 Fed. Reg. 18280 (1974)). 44 FCC 2d at 1071, n.8. In any event the Review Board's Opinion was not that of the Commission and is in no way binding upon it.

B. The Supreme Court has indicated in the Florida East Coast Railway Co. case, among others, that language other than "on the record after opportunity for an agency hearing" may trigger the provisions of 5 U.S.C. §§556 and 557 in rulemaking proceedings, 410 U.S. at 238, but it is clear that the term "full hearing" as used in Section 222(e)(3) is not the equivalent of "on the record." 24/ Requirements for hearings are scattered throughout the Communications Act, and whether or not the specific provision is preceded by the adjective "full" does not appear to be of decisional significance. 25/

24/ The Commission specifically ruled that a trial-type hearing was not required by either the APA or the Communications Act. 57 FCC 2d 195, n. 10 (J.A. 8), and Reconsideration, at p. 3 (J.A. 72). With particular reference to the construction of the latter statute, the principle that an interpretation by an agency charged with the responsibility of administering a particular statute is entitled to "great weight" is a "venerable one." Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 380-81 (1969); United States v. American Trucking Assns., 310 U.S. 534, 549 (1940).

25/ For example, Section 201(a) permits the Commission to order carriers to interconnect after "opportunity for hearing;" Section 204 governs hearings as to legality of new carrier charges and refers to the required proceeding as both a "hearing" and a "full hearing"; section 205(a) authorizes the Commission to prescribe just and reasonable charges after "full opportunity for hearing"; section 209 authorizes the Commission to order a carrier to pay damages after a "hearing"; section 213(a) authorizes the Commission to value carrier property after "opportunity for hearing"; section 214(a) authorizes the Commission to order a carrier to extend its lines after "full opportunity for hearing"; section 221(a) requires the Commission to hold a "public hearing" at the request of interested parties in order to authorize carrier mergers; section 222(c)(1) required the Commission to hold a "public hearing" prior to authorizing the merger of telegraph carriers; section 222(e)(1) and (2) authorized the Commission to prescribe the first international formula after "due notice and hearing"; and section 309(e) requires the Commission to hold a "full hearing" (also referred to in the same paragraph as a "hearing") in broadcast license cases where there is "a substantial and material question of fact...or the Commission is for any reason unable to make the finding specified...."

The Commission has explicitly rejected the idea that the Section 204 "full hearing" requirement mandates a trial-type proceeding, despite the fact that in the past it has "generally investigated tariff filings . . . by oral proceedings." American Telephone and Telegraph (High Density-Low Density Rate Structure), 45 FCC 2d 88 at 88 (1974). In recent years it has increasingly relied upon written proceedings in order to compile the information necessary to make the determinations "after full hearing" required under section 204.[26/] The Federal Power Commission has reached the same conclusion about section 4(e) of the Natural Gas Act, 15 U.S.C. 717 c (e) which requires the FPC to conduct "full hearings" with respect to the filing of new rates by natural gas companies. Re Area Rate Proceeding for Appalachian and Illinois Basins, 44 FPC 1121, 86 P.U.R. 3rd 16 (1970). See also American Public Gas Association v. FPC, 498 F.2d 718 (D.C. Cir. 1974) where it was held that 15 U.S.C. 717c(e) does not mandate trial-type hearings, and Washington

26/ For example, see: (1) American Telephone and Telegraph (High Density-Low Density Rate Structure), 45 FCC 2d 88 (1974) (Designation Order), 58 FCC 2d 362 (1976) (Final Order), appeal pending sub nom Commodity News Services, Inc. v. FCC, D.C. Cir. No. 75-2057. There the Commission suspended a revised national rate structure filed by AT&T and proceeded to decide on the basis of written pleadings and a one day oral argument en banc. The legality of these procedures is not an issue before the court; (2) American Telephone and Telegraph Company (WATS), 46 FCC 2d 81 (1974) (Designation Order), 59 FCC 2d 672 (1976) (Final Order). There the Commission suspended AT&T's revised rate structure for its Wide Area Telecommunications service and proceeded to decide on the basis of written filings; (3) American Telephone and Telegraph Co. (DDS), 50 FCC 2d 501 (1974) (Designation Order). There the Commission instituted an investigation into the lawfulness of the tariff filed and ordered "paper" procedures to be utilized. The final decision has not yet been adopted.

Utilities and Transportation Commission v. FCC, 513 F.2d 1142, 1160-67 (9th Cir. 1975), cert. denied, 423 U.S. 836 (1975), where the court approved the Commission's use of policy/rulemaking procedures in the face of arguments that they did not comply with the standards required by section 214 ("full opportunity for hearing") and section 309 ("full hearing").

If the adjective "full" carried the great weight suggested by petitioner, than those sections of the act which required only a "hearing" or an "opportunity for a hearing" would mandate something less than a "full hearing" or a "full opportunity for hearing." The very suggestion is ludicrous. Clearly, the addition or omittance of the adjective "full" was not calculated to alter significantly the meaning of "hearing"; it simply requires that all interested parties be afforded full opportunity to be heard under the procedure applicable.

The Supreme Court's opinion in United States v. Florida East Coast Railway Co., supra, should have eliminated whatever solace petitioner sought from Morgan v. U.S., 298 U.S. 468 (1936). Petitioner cited Morgan for the proposition that the term "full hearing" is a mandate for trial-type proceedings. That case appeared before the Supreme Court again in 1938, Morgan v. U.S., 304 U.S. 1 (1938) (Morgan II), and this later decision was cited by the losing side in Florida East Coast Railway Co. However, the Court distinguished Morgan II there on grounds relevant to the case here under

review--namely, that it involved not a legislative rulemaking proceeding, but a quasi-judicial proceeding. It further limited the Morgan II holding by concluding that it rested upon the factual situation there present in which affected parties were not adequately notified of the proposed administrative action.[27/] However, the Supreme Court was careful not to distinguish the Florida East Coast case on the ground that it involved a statute which only required a "hearing," whereas the statute in Morgan II required a "full hearing." 410 U.S. at 243. If petitioner RCA's argument about the significance of the additional adjective "full" were a persuasive one, the Supreme Court would have had an additional ground in Florida East Coast upon which to distinguish that case from Morgan II.

27/ Florida East Coast Railway, supra, at 242-244. The New England Divisions Case, 261 U.S. 184 (1923), cited by petitioner, was another "adjudicatory" proceeding, Id. at 197, to determine the unlawfulness of existing divisions of joint railroad rates and to fix a new rate. In any case, although the Court there indicated that trial-type proceedings did fulfill the requirements of the Interstate Commerce Act for a hearing it did not state that other procedures might not have been sufficient. In fact it said "[w]hether a hearing was full, must be determined by the character of the hearing...." Id. at 200. The court said nothing to require that the opportunity afforded to all parties to demonstrate "by evidence and argument" the "propriety or impropriety" of the step asked to be taken had to include the presentation of oral testimony, cross-examination, or oral argument. Ibid. See also Judge Friendly's review of this case in light of the Supreme Court's decision in Florida East Coast Railway Co., concluding that such a case today might well be handled in a comment and rulemaking procedure. Friendly, Some Kind of Hearing, 123 University of Pennsylvania Law Review 1267, 1308 (1975).

Petitioner's main point to be derived from the Morgan cases is that they were "great" cases at the time that Congress adopted section 222, and therefore Congress must have meant for "full hearing" to mean trial-type procedures. (Br. at 30-31). The identical theory did not persuade the Supreme Court in Florida East Coast Railway to reach a different conclusion concerning the necessity for trial-type procedures. There the Court noted that a lower court had concluded that because a "hearing" requirement was inserted into the statute there in issue in 1917,Congress was probably thinking in terms of a "hearing" such as that described in ICC v. Louisville and Nashville R. Co., 227 U.S. 88, 93 (1913) (construing "hearing" to require trial-type procedures). However, as the Supreme Court proceeded to point out, subsequent to that lower court decision, the Supreme Court in United States v. Allegheny Ludlum Steel Corp. 406 U.S. 742 (1972) had construed the same statute as not requiring trial-type procedures. The Court adhered to that judgment. 410 U.S. at 237 (discussing Long Island Railroad Co. v. U.S., 318 F. Supp. 490, 497-98 (E.D. N.Y. 1970). RCA has presented no reason why its argument should fare better here than the same argument fared with the Supreme Court.

C. Federal agencies are no strangers to allegations, like those raised by petitioner here, that trial-type procedures are necessary to resolve certain issues (See Petitioner's Brief at pp. 32-36). However, the Supreme Court has observed that there is ---

> a recognized distinction in administrative law between proceedings for the purpose of promulgating policy-type rules or standards, on the one hand, and proceedings designed to adjudicate disputed facts in particular cases on the other. 28/

This distinction has become of decisional significance as the workload of administrative agencies has increased, and the courts have recognized the importance of insuring that rulemakings such as the one here under review not be shackled by the importation of formalities developed for the adjudicatory process. American Airlines, Inc. v. CAB, 359 F.2d 624, 629 (D.C. Cir. 1966), cert. denied, 385 U.S. 843 (1966). As to the standards which an agency must apply in order to decide exactly what procedures are necessary, two circuit courts have agreed on the following test.

> In the absence of a per se statutory directive, the type of procedure chosen must be related to the kinds of issues involved. 29/

28/ Florida East Coast Railway, 410 U.S. at 245. See in this regard Bell Aerospace Company Division of Textron, Inc. v. NLRB, 475 F.2d 485, 497 (2nd Cir. 1973), where this Court stated that "the argument for rulemaking is especially strong when the Board is proposing to reverse a long-standing and oft-repeated policy on which industry and labor have relied." The Court's decision was subsequently reviewed by the Supreme Court, where it was affirmed in part, and reversed in part. National Labor Relations Board v. Bell Aerospace Co., Div. of Textron, Inc., 416 U.S. 267 (1974). Although the Supreme Court disagreed with the Second Circuit's conclusion that the Board could proceed only by rulemaking, it recognized that the Board could well decide that it would be appropriate to proceed via rulemaking. 416 U.S. at 295.

29/ Bell Telephone Company of Pennsylvania v. FCC, 503 F.2d 1250, 1266 (3rd Cir. 1974), cert. denied, 422 U.S. 1026 (1975). See also Walter Holm and Co. v. Hardin, 449 F.2d 1009, 1015 (D.C. Cir. 1971). Congress has specifically directed the FCC in 47 U.S.C. §154(j) to "conduct its proceedings in such manner

(footnote continued on next page)

This principle of flexibility is such an important one that room exists for its operation even when rulemaking proceedings are required to be conducted under the provisions of 5 U.S.C. 556. For example, 5 U.S.C. 556(d) empowers an agency to limit cross-examination to the extent "required for a full and true disclosure of the facts." Moreover if it is determined that the parties will not be prejudiced thereby, the agency may "adopt procedures for the submission of all or part of the evidence in written form." Ibid. Thus, the rule has evolved that agency rules arrived at with the aid of written submissions cannot be overturned unless the Court determines with "relative certitude" that written procedures were not an adequate mechanism for determining the facts. American Airlines, Inc. v. CAB, 359 F.2d at 630; American Public Gas Association v. FPC, 498 F.2d at 723; Shell Oil Company v. FPC, 520 F.2d 1061, 1075 (5th Cir. 1975).

The Commission's designation order requested the parties to submit "detailed and explicit written positions setting out the facts and other considerations (legal, policy, etc.)" relevant to a decision about the formula. International Carriers Scope of Operations in the Continental United States, 43 FCC 2d 1174, 1182 (J.A. 100). It further provided for the filing of responses and replies to such responses. Ibid.

29/ (footnote continued from last page)
as will best conduce to the proper dispatch of its business," a provision which the courts have recognized prevents any construction of the Communications Act as mandating trials in all cases in which hearings are called for. Bell Telephone Company of Pennsylvania v. FCC, supra, 503 F.2d at 1265.

The Commission did not reject the idea of having oral hearings, but indicated its readiness to utilize them should this prove "necessary or desirable." Ibid. However, that eventuality never materialized.

In addition to the facts and opinions submitted by the parties, the agency commissioned a 13 week study of the industry by Western Union which resulted in a detailed summary by the International Quota Bureau (J.A. 472) and a Policy Research Estimate prepared for the Office of Telecommunications Policy (J.A. 438).

All submittals and data upon which the Commission relied were tendered to petitioner for comment, analysis, dissection and criticism, and for the submittal of rebutting evidence. Between the time of the Commission's 1973 designation order and the 1976 order on reconsideration RCA submitted no fewer than ten filings with the Commission. Despite all this RCA complains to this Court that it was deprived of the opportunity to make the record needed to make a proper appraisal of the International Formula.

Although RCA made several requests for oral proceedings, it never specified why they were necessary to determine the facts. It pointed to no "weakness in the proof which might have been explored or developed more fully by that technique than by the procedures adopted by the Commission."[30/]

30/ WUI makes arguments similar to RCA's regarding the necessity for oral proceedings. However, then it turns around and devotes half of its brief (11-20) to explaining why its view of the facts is correct. It is difficult to understand why written proceedings were no inadequate when WU has so little difficulty expressing in its brief to the Court the very points it asserts it was unable to make to the Commission.

American Public Gas Assoc., 498 F.2d at 723. Petitioner did not come up with its list of "ignored issues" (Br. pp. 33-4) until after the Commission had ruled. See RCA Petition for Stay, p. 8, footnote (J.A. 680). The Court is told in general that those issues should have been explored, but RCA "do[es] not suggest what questions were necessary for this purpose, nor do[es] it explain why its written submittals were ineffectual." American Public Gas Asso. supra at 723.

The "ignored issues" listed by petitioner in its brief at pp. 33-34, to the extent that they are relevant to the determination that the interim formula (as distinguished from the all-routed proposal) is "just, reasonable, equitable, and in the public interest," fall into the category of legislative" rather than "adjudicative" facts.[31/] They are the kinds of issues "involving expert opinions and forecasts, which cannot be decisively resolved by testimony," and where

31/ See American Airlines, supra at 633, citing Professor Davis - Davis, 1 Administrative Law §702, p. 413 (1958):

> Adjudicative facts usually answer the questions of who did what, where, when, how, why, with what motive or intent; adjudicative facts are roughly the kind of facts that go to a jury in a jury case. Legislative facts do not usually concern the immediate parties but are general facts which help the tribunal decide question of law and policy and discretion

This distinction has been recognized by this Court, SEC v. Frank, 388 F.2d 486, 491-2 (2d Cir. 1968); Langevin v. Cenango Court, Inc., 447 F.2d 296, 300 (2d Cir. 1971); In addition see South Terminal Corp. v. EPA, 504 F.2d 646, 660 (1st Cir. 1974), holding the economic and technical factors pertaining to the creation of a regional air quality transportation control plan are not usually "adjudicative" facts.

a month of experience will be worth a year of hearings."[32/] Issues of this type are properly ventilated in non trial-type proceedings.

The "facts" about the industry are not really the source of controversy in this case - the facts are known and not subject to dispute. See RCA's statement to the effect that the Western Union Study and written analysis would expose all the data necessary for the Commission to make an informed decision, Reply Comments of RCA Global Communications, August 16, 1974, p. 13 (J.A. 336). The real controversy here is that RCA and WUI do not agree with the inferences and deductions which the Commission drew from the facts. But

32/ American Airlines, 359 F.2d at 633. The issues which petitioners in the American Airlines case argued could not be decided in a rulemaking proceeding centered around the effect of a CAB rule on the businesses of the Airline carriers. Ibid. Contrary to the implication in RCA's brief (pp. 33-36) and the accusation in its motion for stay to the Commission (J.A. 680), the Commission did not ignore any issues. The issues on which the Commission requested submission of facts and arguments were purposefully worded broadly so that the parties would not be constrained in their presentations, (J.A. 100-101), and the carriers, including RCA (see Br. p. 34, second footnote), addressed every aspect of the problem. Although most of the issues listed by RCA (Br. 33-34) involve estimates and speculation about what might happen and are not susceptible to exact quanitification or unrefutable conclusions, see 57 FCC 2d at 208 (J.A. 26), the Commission did take them into account to the extent that they were relevant. (see, e.g., J.A. 75, 77-78 distribution of facilities and soliciatation costs; J.A. 11-17, 25-26, defects of 1943 formula and disincentives to improved service, and J.A. 17, 25-26, 74, benefits of competition for routings). As to the need for further investigation into the anticipated benefits of the all-routed method (RCA Br., 33), the Commission is presently conducting further proceedings looking into the advantages and disadvantages of that method. See Order, 57 FCC 2d at 214. (J.A. 35-36). The formula now before the court should nevertheless stand on its own merits regardless of the outcome of the proceeding.

that kind of controversy simply is not one requiring oral trial-type proceedings. Even in cases of an unquestionably adjudicatory nature, the Commission is not required to institute a hearing every time a broadcast license is contested: "the decision of whether or not hearings are necessary or desirable is a matter in which the Commission's discretion and expertise is paramount," and a hearing is not required where "the question is not of facts, but of inferences to be drawn from facts already known and the legal conclusions to be derived from these facts." 33/

RCA's argument that the holding in United States v. Storer Broadcasting Co., 351 U.S. 192 (1956), compels this Court to find that section 222(e)(3) mandates a trial-type hearing is demonstratively erroneous. First, the Storer case dealt with section 309 of the Communications Act, 47 U.S.C. 309. That section sets forth the procedures for resolving disputes over broadcast licenses, a type of situation which the APA has unmistakably identified to be

33/ Columbus Broadcasting Coalition v. FCC, 505 F.2d 320, 324 (D.C. Cir. 1974)(footnote omitted).

"adjudication." 5 U.S.C. 558(c). 34/ Moreover, far from diluting the Commission's authority to utilize rulemaking proceedings, the opinion in Storer strongly affirmed the Commission's authority to decide in broad rulemaking proceedings questions of general applicability, which might otherwise have been at issue in individual license adjudications. Thus, that case makes clear that the Court did not withdraw "from the power of the Commission the rulemaking authority necessary for the orderly conduct of its business." Storer Broadcasting, 351 U.S. at 202.

34/ A cursory examination of section 309 quickly reveals other elements, not present in section 222, which point to the conclusion that section 309 contemplates trial-type hearings: extensive procedural details, and a statement in section 309(c) that "all issues . . . shall be tried . . . ." (emphasis added). As indicated above, however, even 47 U.S.C. 309 with its "full hearing" phraseology does not require a hearing when the question is not one of fact, but of inferences and conclusions to be drawn therefrom.

II. THE COMMISSION MADE THE FINDINGS REQUIRED TO PRESCRIBE THE INTERIM FORMULA.

Having found the 1943 formula to be unjust, unreasonable, inequitable and not in the public interest, the Commission was required to replace it with one which satisfied the requirements of 47 U.S.C. 222(e)(3).[35] The interim formula was prescribed because it does meet these requirements.

The Commission's criticisms of the 1943 formula and its descriptions concerning how the interim formula will be more equitable and beneficial to the public interest amply support a determination that the interim formula is just, reasonable, equitable and in the public interest.[36] For example:

> We cannot ignore the possibility that quality of service could have been improved absent the inequities of the formula. In any event, by placing distribution of traffic on a rational and competitive basis, we can minimize this danger and maximize the possibility of future benefits. For this reason, we believe the distortions in distribution patterns in the present formula are injurious to the public interest and should be eliminated.[37]

35/ 57 FCC 2d at 191 (J.A. 2-3). As to RCA's arguments that the Commission's findings regarding the unlawfulness of the 1943 formula were inadequate, we rely on our Counterstatement pp. 8-12.

36/ In its order vacating its stay of the effective date of the interim formula, the Commission specifically affirmed that its earlier orders had determined the interim formula to be "just, reasonable, equitable and in the public interest." (Addendum A-6).

37/ 57 FCC 2d at 202 (J.A. 17)(emphasis added).

See also the discussion at pages 208-212 (J.A. 25-30) of the Commission's order. For example:

> However, we believe that for purposes of this proceeding an appropriate general statement of the public's interest is the statutory requirement that we guarantee residents of the United States a rapid, efficient communications service with adequate facilities and reasonable charges. 47 U.S.C. §151. We believe the market-sharing features of the present formula are ill-designed to advance this statutory goal. 38/
>
> . . . . .
>
> there has been no stimulus under the present formula to improve service or increase efficiency. In this situation, we believe that the public is ill served by a formula which stifles user choice. 39/
>
> . . . . .
>
> the interim formula will provide an equitable means of distribution which will focus on customer selection and give the IRCs a chance to solicit routings. 40/

On reconsideration the Commission reaffirmed these findings even more explicitly. For example:

> Our experience convinces us that maintenance of the present service quality and its improvement is more likely where the carriers are required to earn the traffic they receive than where they receive it arbitrarily under a fixed quota. 41/

38/ 57 FCC 2d at 208 (J.A. 25-26)(emphasis added).

39/ Ibid., (J.A. 26).

40/ 57 FCC 2d at 210 (J.A. 28)(emphasis added).

41/ Reconsideration at 4 (J.A. 73).

. . . .

> The features of the formula we found objectionably anti-competitive (the fixed quotas and the balancing provisions) were necessary in 1943 as the most reasonable way to protect the IRC's against WU abuses. Our January Report and Order found that WU's divestment of its international operations had removed the need for those features and that traffic distribution could be made on a more dynamic basis. Our interim formula retains those aspects of the original formula which we believe remain sound and desirable under present conditions. 42/

. . . .

> We recognize that proportionate distribution is not the only way to distribute unrouted traffic, but it appears to us the most reasonable basis for distributing traffic because it relies on the experience in the market place rather than arbitrary judgment of this Commission. Proportionate distribution, coupled with the interim formula's requirement for frequent updating of the carriers' quotas, allows the distribution to reflect, relatively immediately, changes in the market place and rewards carriers with additional unrouted traffic when when they succeed in persuading more customers to route messages via a specific carrier. 43/

. . . .

> Having found that the original formula provided no incentives for the IRC's to improve service or increase efficiency, our obligations under the mandate of 47 U.S.C. §151 dictated that we adopt a formula which does provide such stimuli. 44/

42/ Reconsideration at 4 (J.A. 73)(emphasis added).

43/ Reconsideration at 5 (J.A. 74)(emphasis added).

44/ Ibid. (emphasis added).

. . . .

> The primary question here, in addition to whether it serves the public interest, is to assure that the distribution of unrouted traffic be just, reasonable and equitable, and that if it appears to us that it is not, our obligation is to replace it with one that is equitable. 45/

. . . .

> We believe, however, that the public will benefit from the new method of distribution through the incentives it provides the carriers to increase their efficiency and to maintain or improve service quality. 46/

. . . .

> No grounds exist, therefore, for further denying the other carriers the equitable distribution embodied in the interim formula. 47/

It is undisputed that the 1943 formula was a system of proportionate distribution. Nor is there uncertainty with respect to the basic facts concerning how the 1943 formula has distributed traffic. Therefore, RCA could understandably say to the Commission that the Western Union study together with opportunity for parties to file comments would provide the Commission with enough data to make a decision. Discussed supra at pp. .

The Commission analyzed the data and the pleadings and reached two basic conclusions: (1) Due to certain changes in the industry not anticipated by the 1943 formula, the

45/ Ibid. (emphasis added).

46/ Reconsideration at 10 (Ex. p. 506)(emphasis added).

47/ Ibid. (emphasis added).

message traffic was no longer being distributed proportionately, or equitably, but was being distributed in an irrational manner; and (2) this manner of distribution provided no incentive to the IRC's to improve service or increase efficiency and was therefore ill-designed to advance the public interest goals of maintaining an efficient communications service with adequate facilities and reasonable charges. 57 FCC 2d at 208 (J.A. 25-26). The lack of such incentives is clear since the 1943 formula worked to give more unrouted traffic to the carrier which was least successful in attracting traffic on its own.

The interim formula ended this situation under which carriers were accumulating large "overages" and "deficiencies," and provided a positive incentive to carriers to provide the best service. The reasons for prescribing the interim formula, far from being complex or unfathomable as petitioner suggests, are clear, straightforward and compelling.

Nor can the Commission's decision be challenged as one founded upon a simplistic reliance on comeptition as the equivalent of the public interest in violation of the principles laid down in FCC v. RCA Communications, Inc., 346 U.S. 86 (1953), and Hawaiian Telephone Co. v. FCC, 498 F.2d 771 (D.C. Cir. 1974). The 1943 formula itself was designed to "continu[e] and even promot[e] reasonable competition." Application for Merger of the Western Union Telegraph Co.

and Postal Telegraph Co., 10 FCC at 195. The Commission was not oblivious to the effect upon competition of the 1943 formula. In fact, at the time, it stated:

> We recognize, however that over-all competition may be lessened as a result of the organized distribution of traffic, and we intend to maintain careful surveillance over the operations of the international telegraph carriers to assure that progress in providing efficient and economical service in this field will continue. 48/

Of course, when the Commission next investigated the situation, it discovered that its formula had eroded to the point that it provided no incentive whatsoever "to assure that progress in providing efficient and economical service" would continue. In fact, if anything, it provided a disincentive to innovation. The Commission was thus justifiably concerned about "the possibility that quality of service could have been improved absent the inequities of the formula." 57 FCC 2d at 202 (J.A. 17). Although the Commission has not yet completed its study to determine whether another new approach, namely the all-routed proposal, might be the best means of serving the public interest, it has determined that, as between the discredited 1943 formula and the interim formula, the latter method of distribution better serves the public interest. Referring

48/ Ibid. (emphasis added).

to its concern that the inequities in the 1943 formula might have prevented improvements in the quality of service, the Commission said that the interim formula would "minimize this danger and maximize the possibility of future benefits." Ibid.

The fact that the Commission is unable to predict in detail the exact nature of the service improvements it hopes to stimulate under the interim formula should not prevent it from being implemented. See Mt. Mansfield Television, Inc. v. FCC, 442 F.2d 470, 487 (2nd Cir. 1971), and General Telephone Co. of Southwest v. U.S., 449 F.2d 846, 858 (5th Cir. 1971). As the Supreme Court observed in 1953 -----

> To restrict the Commission's action to cases in which tangible evidence appropriate for judicial determination is available would disregard a major reason for the creation of administrative agencies, better equipped as they are for weighing intangibles 'by specialization, by insight gained through experience, and by more flexible procedure.' Far East Conf. v. United States, 342 U.S. 570, 575. In the nature of things, the possible benefits of competition do not lend themselves to detailed forecast, cf. Labor Board v. Seven-Up Co., 344 U.S. 344, 348, but the Commission must at least warrant, as it were, that competition would serve some beneficial purpose such as maintaining good service and improving it.

FCC v. RCA Communications, Inc., 346 U.S. 86, 96-97. The Commission has satisfied this test in the present case.

Both the RCA and Hawaiian Telephone cases stand for the principle that the Commission may not simply equate the public interest with additional competition and thus make its decisions on the exclusive ground that competition will be increased. 49/ They emphasize that competition is but one of the factors which the agency is obligated to consider in determining the public interest. See RCA, 346 U.S. at 94; Hawaiian Telephone, 498 F.2d at 776. See also Pocket Phone Broadcast Service, Inc. v. FCC, 538 F.2d 447, 451 (D.C. Cir. 1976) where the court, referring to these two cases, said:

> The Commission's opinions however clearly reflect that its decision is not based on the premise that competition is desirable for its own sake; on the contrary the Commission carefully explains that in view of the unmet need for additional one-way signalling units in the Buffalo area the entry of New York Telephone into the field is required by the public convenience and necessity. This reasoning is entirely consistent with the holdings of the two cited cases, which require only that the Commission must not assume that competition is desirable for its own sake, but must consider all the factors bearing on the public convenience and necessity. (Citation ommitted.)

49/ The United States agrees that the Commission findings satisfy the requirements of RCA and Hawaiian Telephone. However, the United States is of the view that those requirements may not be applicable in the circumstances of this case. See, FMC v. Svenska Amerika Linien, 390 U.S. 238 (1968).

Here, the Commission's decision to implement the interim formula was based upon the agency's judgment that its action would serve the legitimate public interest objectives of providing an equitable means of distributing unrouted messages in a fashion most conducive to stimulating the carriers to maintain and improve quality of service. 50/ This is a far cry from the exclusive reliance on competition condemned in RCA and Hawaiin Telephone.

50/ It is clear that Congress intended the International Formula to achieve two distinct goals: (1) to protect the interests of the general public; and (2) to insure an equitable distribution of traffic between the carriers. See for example the Report of the Committee on Interstate Commerce United States Senate, 77th Congress, 1st Session, Report No. 769, October 28, 1941, p. 25, where the Committee recommended that the section 222 be written to accomplish 12 listed goals, among which were:

> (h) That the legislation also should require in addition to these labor-protection requirements, specific proper safeguards for the interests of the using and general public and the industry as a whole or individual units thereof; and
>
> (i) The legislation should grant the Federal Communications Commission appropriate regulatory powers with respect to the fair and equitable treatment of traffic between the domestic and international carriers.

Thus, it would appear that even if the Commission had found that there was no difference between the 1943 formula and the interim formula as far as service to users was concerned, it could have repealed the 1943 formula solely on the basis that it was inequitable. This fact is further attested to by the use of the disjunctive "or" in section 222(e)(3) itself: "Whenever ... the Commission finds that any such distribuiton of telegraph traffic among telegraph carriers ... is or will be unjust, unreasonable, or inequitable, or not in the public interest ...." (Emphasis added.)

CONCLUSION

For all the foregoing reasons, the Commission's orders should be affirmed.

Respectfully submitted,

Donald I. Baker,
Assistant Attorney
General,

Carl D. Lawson,
Attorney,

James Ponsoldt,
Attorney.

Department of Justice
Washington, D.C. 20530

Werner K. Hartenberger,
General Counsel,

Daniel M. Armstrong,
Associate General Counsel,

Jack D. Smith,
Counsel.

Federal Communications Commission
Washington, D.C. 20554

November 19, 1976

ADDENDA

ADDENDUM A-1

47 U.S.C. 222(c)(2).

(2) Any proposed consolidation or merger of domestic telegraph carriers shall provide for the divestment of the international telegraph operations theretofore carried on by any party to the consolidation or merger, within a reasonable time to be fixed by the Commission, after the consideration for the property to be divested is found by the Commission to be commensurate with its value, and as soon as the legal obligations, if any, of the carrier to be so divested will permit. The Commission shall require at the time of the approval of such consolidation or merger that any such party exercise due diligence in bringing about such divestment as promptly as it reasonably can.

ADDENDUM A-2

47 U.S.C. 222(e).

(e)(1) In the case of any consolidation or merger of telegraph carriers pursuant to this section, the consolidated or merged carrier shall, except as provided in paragraph (2) of this subsection, distribute among the international telegraph carriers, telegraph traffic by wire or radio destined to points without the continental United States, and divide the charges for such traffic, in accordance with such just, reasonable, and equitable formula in the public interest as the interested carriers shall agree upon and the Commission shall approve: *Provided, however*, That in case the interested carriers shall fail to agree upon a formula which the Commission approves as above provided, the Commission, after due notice and hearing, shall prescribe in its order approving and authorizing the proposed consolidation or merger a formula which it finds will be just, reasonable, equitable, and in the public interest, will be, so far as is consistent with the public interest, in accordance with the existing contractual rights of the carriers, and will effectuate the purposes of this subsection.

(2) In the case of any consolidation or merger pursuant to this section of telegraph carriers which, immediately prior to such consolidation or merger, interchanged traffic with telegraph carriers in a contiguous foreign country, the consolidated or merged carrier shall distribute among such foreign telegraph carriers, telegraph traffic by wire or radio destined to points in such contiguous foreign country and shall divide the charges therefor, in accordance with such just, reasonable, and equitable formula in the public interest as the interested carriers shall agree upon and the Commission shall approve: *Provided, however*, That in case the interested carriers should fail to agree upon a formula which the Commission approves as above provided, the Commission, after due notice and hearing, shall prescribe in its order approving and authorizing the proposed consolidation or merger a formula which it finds will be just, reasonable, equitable, and in the public interest, will be, so far as is consistent with the public interest, in accordance with the existing contractual rights of the carriers, and will effectuate the purposes of this subsection. As used in this paragraph, the term "contiguous foreign country" means Canada, Mexico, or Newfoundland.

(3) Whenever, upon a complaint or upon its own initiative, and after a full hearing, the Commission finds that any such distribution of telegraph traffic among telegraph carriers, or any such division of charges for such traffic, which is being made or which is proposed to be made, is or will be unjust, unreasonable, or inequitable. or not in the public interest, the Commission shall by order prescribe the distribution of such telegraph traffic, or the division of charges therefor, which will be just, reasonable, equitable, and in the public interest, and will be, so far as is consistent with the public interest, in accordance with the existing contractual rights of the carriers.

(4) For the purposes of this subsection, the international telegraph operations of any domestic telegraph carrier shall be considered to be the operations of an independent international telegraph carrier, and the domestic telegraph operations of any international telegraph carrier shall be considered to be the operations of an independent domestic telegraph carrier.

ADDENDUM A-3

5 U.S.C. 553.

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

ADDENDUM A-4

5 U.S.C. 556.

Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision

(a) This section applies, according to the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.

(b) There shall preside at the taking of evidence—

(1) the agency;

(2) one or more members of the body which comprises the agency; or

(3) one or more hearing examiners appointed under section 3105 of this title.

This subchapter does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specially provided for by or designated under statute. The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.

(c) Subject to published rules of the agency and within its powers, employees presiding at hearings may—

(1) administer oaths and affirmations;

(2) issue subpenas authorized by law;

(3) rule on offers of proof and receive relevant evidence;

(4) take depositions or have depositions taken when the ends of justice would be served;

(5) regulate the course of the hearing;

(6) hold conferences for the settlement or simplification of the issues by consent of the parties;

(7) dispose of procedural requests or similar matters;

(8) make or recommend decisions in accordance with section 557 of this title; and

(9) take other action authorized by agency rule consistent with this subchapter.

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(e) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

ADDENDUM A-5

5 U.S.C. 557.

Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record

(a) This section applies, according to the provisions thereof, when a hearing is required to be conducted in accordance with section 556 of this title.

(b) When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554(d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule. When the agency makes the decision without having presided at the reception of the evidence, the presiding employee or an employee qualified to preside at hearings pursuant to section 556 of this title shall first recommend a decision, except that in rule making or determining applications for initial licenses—

(1) instead thereof the agency may issue a tentative decision or one of its responsible employees may recommend a decision: or

(2) this procedure may be omitted in a case in which the agency finds on the record that due and timely execution of its functions imperatively and unavoidably so requires.

(c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions—

(1) proposed findings and conclusions; or

(2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and

(3) supporting reasons for the exceptions or proposed findings or conclusions.

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order, sanction, relief, or denial thereof.

ADDENDUM A-6

Before the
Federal Communications Commission
Washington, D. C. 20554

FCC 76-1035

42967

In the Matter of	
International Record Carriers' Scope of Operations in the Continental United States, Including Possible Revisions to the Formula Prescribed Pursuant to Section 222 of the Communications Act	Docket No. 19660 RM-690

ORDER

Adopted: November 9, 1976; Released: November 18, 1976

By the Commission:

1. On October 19, 1976, the United States Court of Appeals for the Second Circuit issued an Order denying a Motion by RCA Global Communications, Inc. (RCA) for stay pending review of our Report and Order and Notice of Proposed Rulemaking in the above-captioned matter, 57 FCC 2d 190 (1976). By subsequent Order, 58 FCC 2d 266 (1976), we stayed the effectiveness of our Report and Order on our own motion to consider challenges to our repeal of the 1943 formula for distribution of outbound, unrouted international message telegrams and prescription of an interim formula. On September 27, 1976, we released a Memorandum Opinion and Order herein, FCC 76-882, ___ FCC 2d ___, denying RCA's petition before us for stay of that Report and Order. Pursuant to paragraph 30 of our September 27 Order, we continued our stay of the Order to allow RCA opportunity to obtain a ruling from the court.

2. In our Report and Order, we found that the 1943 formula is unjust, unreasonable, inequitable and not in the public interest and that the interim formula set forth in the Appendix thereto, 57 FCC 2d at 216-19, is just, reasonable, equitable and in the public interest. We reaffirmed our action in our September 27 Order; and the reviewing Court has declined to issue a stay or to disturb our denial of RCA's petition. Accordingly, we see no reason why our repeal of the 1943 formula and implementation of the interim formula should not become effective at the earliest reasonable time.

3. The Western Union Telegraph Company, charged under our Report and Order with the responsibility of implementing the interim formula, has informed us that it will be ready to proceed with automated procedures for such implementation on November 13, 1976. Accordingly, we will make the interim formula effective on that date. The parties herein are directed to conclude their preparations so that the interim formula may be implemented without further delay.

ADDENDUM A-7

4. Accordingly, IT IS ORDERED That the stay in the above-captioned proceeding, 58 FCC 2d 266 (1976), entered February 26, 1976, is hereby VACATED, effective November 13, 1976.

5. IT IS FURTHER ORDERED That Paragraphs 63 and 65 of our Report and Order and Notice of Proposed Rulemaking, 57 FCC 2d 190 at 215, 216, (1976), are modified to become effective November 13, 1976.

FEDERAL COMMUNICATIONS COMMISSION

Vincent J. Mullins
Secretary

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RCA GLOBAL COMMUNICATIONS, INC., Petitioners,	)	
v.	)	
	)	No. 76-4054
FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, Respondents,	)	
ITT WORLD COMMUNICATIONS INC., et al., Intervenors.	)	

CERTIFICATE OF SERVICE

I, Mary C. Ross, hereby certify that the foregoing "Brief For Respondents" was served this 19th day of November, 1976, by mailing true copies thereof, to the following persons at the addresses below:

H. Richard Schumacher, Esq.
Cahill, Bordon & Reindel
80 Pine Street
New York, New York 10005
Counsel for RCA Global Communications, Inc.

Carl D. Lawson, Esq.
Department of Justice
Washington, D.C. 20530
Counsel for USA

Howard A. White, Esq.
LeBoeuf, Lamb, Leiby & MacRae
140 Broadway
New York, New York 10005
Counsel for ITT World Communications, Inc.

E. Edward Bruce, Esq.
Covington & Burling
888 Sixteenth Street, N.W.
Washington, D.C. 20006
Counsel for TRT Telecommunications Corporation

Alvin K. Hellerstein, Esq.
Stroock, Stroock & Lavan
61 Broadway
New York, New YOrk 10006
Counsel for Western Union International, Inc.

Roderick A. Mette, Esq.
TRT Telecommunications Corp.
1747 Pennsylvania Ave., N.W.
Washington, D.C. 20006
Counsel for TRT Telecommunications Corp.

Mary C. Ross

CERTIFICATE OF SERVICE

I certify that the supplemental brief after remand of petitioner RCA Global Communications, Inc. and the supplemental joint appendix were served on all parties to this proceeding this date by mailing copies, in a sealed wrapper, first-class postage prepaid, to each of the following:

Honorable Griffin B. Bell
Attorney General of the U. S.
Attn: Joen Grant, Esq.
U. S. Department of Justice
Washington, D. C. 20531
Attorney for Respondent
United States of America

Robert R. Bruce, Esq.
General Counsel
Attn: Jack David Smith, Esq.
Federal Communications Commission
1919 M Street, N.W.
Washington, D. C. 20554
Attorney for Respondent
Federal Communications Commission

LeBoeuf, Lamb, Leiby & MacRae
Attn: Grant Lewis, Esq.
140 Broadway
New York, New York 10005
Attorneys for Intervenor
ITT World Communications Inc.

Covington & Burling
Attn: Edward Bruce, Esq.
888 16th Street, N.W.
Washington, D. C. 20006
Attorneys for Intervenor
TRT Telecommunications Corp.

Stroock & Stroock & Lavan
Attn: Alvin K. Hellerstein, Esq.
61 Broadway
New York, New York 10006
Attorneys for Intervenor
Western Union International, Inc.

Jan. 27, 1978

H. Richard Schumacher
Of Counsel to RCA Global
Communications, Inc.